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IN THE

Supreme Court of the United States

October Term, 1941.

No. 245

CUDAHY PACKING COMPANY OF LOUISIANA, LTD.,

Petitioner,

versus

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION OF CUDAHY PACKING COMPANY OF LOUISIANA, LTD., FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF SAID PETITION FOR A WRIT OF CERTIORARI.

James V. Hayes
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STEPHEN C. HARTEL,
LEOPOLD STAHL,
JONAS C. SPORL,
Attorneys for Petitioner.

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CUDAHY PACKING COMPANY OF LOUISIANA, LTD.,
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PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION OF CUDAHY PACKING COMPANY OF LOUISIANA, LTD., FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Cudahy Packing Company of Louisiana, Ltd., a corporation organized and doing business under the laws of the State of Louisiana, with its principal office

at New Orleans, in said State, respectfully presents this, its application for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Fifth Circuit entered, after rehearing was denied, on April 19, 1941, affirming the decree of the District Court of the United States for the Eastern District of Louisiana entered June 18, 1940.

OPINION BELOW.

The opinion of the Court below, filed April 19, 1941, is reported in 119 F. (2d) 209 (Rec. pp. 70 and 71).

STATUTE INVOLVED.

The statute which is involved in these proceedings is the Act of June 25th, 1938, c. 676, Sec. 1 *et seq.*, 52 Stat. 1060, (Title 28, U. S. C. A. Sec. 201 *et seq.*) known as the "Fair Labor Standards Act of 1938".

BASIS OF JURISDICTION.

Jurisdiction of this Honorable Court is invoked under Paragraph (a), Sec. 240 of the Judicial Code, as amended (Sec. 347, Title 28, U. S. C. A.).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed April 19th, 1941; a petition for

rehearing was filed May 8, 1941, and a rehearing was refused May 31st, 1941. Application for a stay of the mandate of the Court below, pending application in this Court for a writ of certiorari, was made on June 12, 1941, and on the same date, an order staying its mandate for thirty days was entered by the Court below in order to enable Petitioner to apply to this Honorable Court for a writ of certiorari to review said decree of the United States Circuit Court of Appeals for the Fifth Circuit.

SUMMARY STATEMENT OF MATTER INVOLVED.

One Robert T. Amis, styling himself "an officer designated by the Administrator of the Wage and Hour Division" of the United States Department of Labor, and later shown to be a Regional Director of the said Wage and Hour Division, addressed a *subpoena duces tecum* to the Cudahy Packing Company of Louisiana, Ltd., a Louisiana corporation, the Petitioner herein, ordering it to produce at a designated place and time in the City of New Orleans, State of Louisiana, certain of its books and records, located in the City of Shreveport, Louisiana, (Rec. pp. 47 and 48).

In response to the subpoena, Petitioner requested detailed information concerning alleged violations of the Fair Labor Standards Act of 1938. To this request, the Regional Director refused to accede and the Administrator of the Wage and Hour Division filed an application in the United States District Court for the Eastern District of Louisiana, at New Orleans, for the production of the records subpoenaed by the Regional Director.

In the Administrator's application for the enforcement of the subpoena, it is alleged that Petitioner, a Louisiana corporation, is a branch of the Cudahy Packing Company of Chicago, Illinois, a Maine corporation, and that Petitioner employed persons engaged in interstate commerce or in the production of goods for interstate commerce. To the application, Petitioner filed a motion to dismiss for lack of jurisdiction on the ground that Petitioner is a Louisiana corporation and that its employees are not engaged in interstate commerce or in the production of goods for interstate commerce; and that, in the alternative, the application be quashed for failure of particularity in its object and purposes and called, also in the alternative, for a bill of particulars.

The record is without evidence of any kind with respect to Petitioner's business or violations by it of the Fair Labor Standards Act of 1938 other than an *ex parte* affidavit by a representative of the Administrator of the Wage and Hour Division, which was ordered struck out by the Court. Nevertheless, the District Court ordered the production of the following records of Petitioner:

> "(1) Any and all books and records which record the wages paid to your employees employed in your plant in Shreveport, Louisiana, during the period from October 24, 1938, to March 23, 1940;
>
> "(2) Any and all books, documents, time cards, time sheets, papers, or memoranda made or kept by you which record the hours worked each workday and each workweek by your said employees during the period from October 24, 1938, to March 23, 1940."

This judgment was affirmed by the Court below (Rec. pp. 70 and 71).

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

1. The holding of the Court below that the issuance of the *subpoena duces tecum* herein, same having been issued by a Regional Director of the Wage and Hour Division of the United States Department of Labor and not by the Administrator as required by the Fair Labor Standards Act of 1938, is valid, is in direct conflict with the holding of the United States Circuit Court of Appeals for the First Circuit in the case of *Lowell Sun Company vs. Fleming, Administrator, Wage and Hour Division,* decided June 6, 1941, not yet reported but whose opinion is printed in full in the Appendix hereof for the convenience of this Court.

2. The failure of the Attorney General of the United States, as required by Section 4(b) of the Fair Labor Standards Act of 1938, to bring this proceeding nullifies same. This is a question which the Supreme Court of the United States has not yet decided but which should be decided by it.

3. That the subpoena issued herein and ordered carried out by the Court below, calling for records on all employees of Petitioner, is directly violative of the Fourth Amendment to the Constitution of the United States, directed against unreasonable searches and seizures and

is similar in all respects to many other subpoenas issued by the Wage and Hour Division and involves questions which have never been, but should be decided by this Court.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the Judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be granted.

STEPHEN C. HARTEL,
LEOPOLD STAHL,
JONAS C. SPORL,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

1. The Administrator of the Wage and Hour Division of the United States Department of Labor is without authority to delegate his power to issue subpoenas duces tecum.

The Court below stated in its opinion that: "The Administrator of the Wage and Hour Division issued a subpoena duces tecum". This is manifestly erroneous as reference to "Exhibit D" in the record herein will show. (Rec. pp. 47-48.) In the said exhibit, it appears that the subpoena was issued by one Robert T. Amis, who styles himself as "an officer designated by the Administrator of the Wage and Hour Division" of the United States Department of Labor. From page 52 of the record, it appears that said Robert T. Amis is a Regional Director of the aforesaid Division. Obviously, therefore, the subpoena herein was issued by a Regional Director and not by the Administrator himself.

The authority for the issuance of the subpoena by a Regional Director is purportedly derived from an order of the Administrator designated as "Exhibit C". (Rec. pp. 44-46, incl.). It is Petitioner's contention that such delegation of power by the Administrator is not permissible under the Fair Labor Standards Act of 1938, and any *subpoena duces tecum* issued by anyone other than the Administrator is null and void.

Section 9 of the Fair Labor Standards Act, providing for the production of books, papers and documents, provides as follows:

> "For the purpose of any hearing or investigation provided for in this Act, the provisions of Sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. A. 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees."

That portion of Section 9 of the Federal Trade Commission Act pertaining to the issuance of subpoenas provides as follows:

> "For the purposes of this subdivision of this chapter the Commission or its duly authorized agent or agents shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas and members and examiners of the Commission may administer oaths and affirmations, examine witnesses and receive evidence."

It is plain from these sections that the Administrator must issue *subpoenas duces tecum*. Nowhere in the Fair Labor Standards Act is the Administrator given authority

to delegate his power in this respect. Section 4(c) of the Fair Labor Standards Act, the only provision therein which might appear to permit the Administrator to delegate his authority to issue *subpoenas duces tecum*, provides as follows:

> "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place."

It has already been held that this section has reference only to the place where the powers of the Administrator and the powers of his representatives, respectively, granted elsewhere in the Fair Labor Standards Act, may be exercised.

> *Lowell Sun Company vs. Fleming, Administrator, Wage and Hour Division* (U. S. C. C. A. 1st Cir.) decided June 6th, 1941, as yet unreported but set out in full in the Appendix hereof.

In the *Lowell Sun* case the Court, on the question of whether Section 4(c) of the Act authorized the Administrator to delegate his power to issue *subpoenas duces tecum*, said the following:

> "From the wording of the section as a whole and its position in the statute; from the improbability that Congress intended to clothe the Administrator with authority to delegate 'any or all' of his functions, and from the fact that to construe section 4(c) as a grant of authority to delegate would reduce to mere surplusage the provisions of Section 11(a), which gives the Administrator express authority to delegate his investigatory function, we are of the

opinion that Congress, when it enacted section 4(c), intended to provide not for the extent of the powers of the Administrator and his representatives, but only to provide for the place where the powers given elsewhere in the Act might be exercised."

That Congress was not unmindful of the question of the delegation of the power to issue *subpoenas duces tecum* is evident from the following statutory provisions in which it has seen fit to limit the power to issue subpoenas to the head or heads of the Administrative Agencies provided for therein:

> Federal Trade Commission, 15 U. S. C. A. Sec. 49; Civil Service Commission, 18 U. S. C. A. Sec. 611 (d); Board of Tax Appeals, 26 U. S. C. A. Int. Rev. Code, Sec. 1114, 1119 (b); National Labor Relations Board, 29 U. S. C. A. Sec. 161 (1);

and in the following instances in which it made express provision for the delegation of the subpoena power by the heads of Administrative Agencies:

> Securities and Exchange Commission, 15 U. S. C. A. Sec. 77uuu (a), 79r (c); Federal Power Commission, 15 U. S. C. A. Sec. 717m (c), 16 U. S. C. A. Sec. 825f (b); Tariff Commission, 19 U. S. C. A. Sec. 1333; United States Maritime Commission, 46 U. S. C. A. Sec. 1124; Federal Communications Commission, 47 U. S. C. A. 409 (a).

The intent of Congress to limit the powers of the issuance of *subpoenas duces tecum* under the Fair Labor Standards Act to the Administrator is obvious from the

inclusion of Sections 9 and 10 of the Federal Trade Commission Act in the Fair Labor Standards Act.

2. All litigation under the Fair Labor Standards Act of 1938 must be carried on by and under the direction and control of the Attorney General of the United States.

Section 4(b) of the Fair Labor Standards Act provides:

> "Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General."

There is nothing in this record showing that this matter was under the direction or control of the Attorney General or that he had any part in it whatsoever. The Attorney General is the chief law officer of the United States. If, as the Act provides, he exercised the necessary control over litigation under the Fair Labor Standards Act, he could thereby prevent a multiplicity of suits. It is possible to conceive of a situation in which the same question might arise in several parts of the country. If the Attorney General directed the handling of litigation under this Act, he could hold in abeyance all these matters except one so that the question might be submitted for decision by the Courts. This would serve to reduce litigation and the consequent burden upon the Courts. The wisdom of such a procedure is evident and must have been in the mind of Congress when Section 4(b) was included in the Fair Labor Standards Act.

Further than this, Section 9 of the Fair Labor Standards Act includes Sections 9 and 10 of the Federal Trade Com-

mission Act, which provide in great detail and specifically that the Attorney General shall assume control of all litigation under the Federal Trade Commission Act. The particular provision of Section 9 of the Federal Trade Commission Act applicable hereto provides as follows:

> "Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this subdivision of this chapter or any order of the Commission made in pursuance thereof."

This Court has passed upon that portion of Section 9 of the Federal Trade Commission Act quoted above in the case of *Federal Trade Commission v. Claire Furnace Company*, 274 U. S. 160, in which it was said:

> "It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful, before asking the court to adjudge forfeiture for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide scope and variety of the questions, answers to which are asked in these orders, show the wisdom of requiring the chief law officer of the government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in (invoking) the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor

and discussion. The purpose of Congress in this requirement is plain, and we do not think that the court below should have dispensed with such assistance."

The herein proceedings are in the nature of a mandamus for the reason that it is a proceeding seeking to compel Petitioner to comply with a purported order of the Administrator. The proper remedy to secure such compliance is by mandamus.

It is submitted that this Court has never passed upon this question and should do so in the interest of the proper administration of the Act.

3. The subpoena duces tecum ordered carried out by the Court below is violative of the Fourth Amendment to the Constitution of the United States.

There is nothing in the subpoena ordered carried out which shows any basis for the demand to examine the records of Petitioner or in the application of the Administrator for an order of the District Court to compel the Petitioner to carry out the subpoena other than the general suspicion of violations of the Act. Such general allegations, without alleging specific facts upon which the Court can make a determination of violations of the Act, were not sufficient to support the issuance of the *subpoena duces tecum*. Further than this, the subpoena itself is exceedingly broad and fails to state specifically the nature of the information sought and the purpose for which it is demanded. In the instant case the Administrator, in allegation XIII of his application (Rec. p. 8)

plainly admits that one of the purposes of the subpoena was to ascertain if Petitioner's employees are subject to the Act and whether they were paid in accordance with the terms thereof. This is an unreasonable demand upon Petitioner and comes within the purview of the Fourth Amendment to the Constitution of the United States protecting one against unreasonable searches and seizures.

Boyd v. United States, 116 U. S. 616.

A corporation is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures of its papers.

Hale v. Henkel, 201 U. S. 43, 73.
Federal Trade Commission v. American Tobacco Co., 264 U. S. 298.

In the latter case, a broad subpoena, seeking to conduct a general exploratory search, "a fishing expedition", as it was termed by this Court, among the records of the defendant in the hope of uncovering something, was held invalid. The enforcement of the subpoena in the *American Tobacco Co.* case was sought under Section 9 of the Federal Trade Commission Act. This is exactly the situation in the instant case since the Administrator is seeking to proceed under Section 9 of the Federal Trade Commission Act embodied in Section 9 of the Fair Labor Standards Act.

CONCLUSION.

We respectfully urge that the issues raised herein are serious and important ones, involving, in one instance, a grave conflict of decisions by the United States Circuit Courts of Appeals for the Fifth Circuit and the First Circuit, and with respect to all of the issues questions of Federal law which should be, but which have never been, passed upon by this Court and that a writ of certiorari should issue.

Respectfully submitted,

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Attorneys for Petitioner.

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APPENDIX.

Circuit Court of Appeals, First Circuit.

Lowell Sun Co.
vs. **No. 3654.**
Fleming, Administrator, Wage and Hour Division.

June 6, 1941.

Appeal from the District Court of the United States for the District of Massachusetts; Francis J. W. Ford, Judge.

Proceeding by Philip G. Fleming, Administrator, Wage and Hour Division, United States Department of Labor, against the Lowell Sun Company, for an order requiring the respondent to appear and show cause why it should not appear and produce its books and records in accordance with a *supoena duces tecum*. From an order denying respondent's motion to vacate the show-cause order and dismiss the proceeding, granting plaintiff's application and ordering respondent to appear and produce its books and records, *36 F. Supp. 320*, respondent appeals.

Order vacated and case remanded, with direction.

Elisha Hanson, of Washington, D. C. (William R. Cook, of Boston, Mass., Frank Goldman, of Lowell, Mass., Johnson, Clapp, Ives & Knight, of Boston, Mass., and William K. Van Allen and Harold L. Cross, Jr., both of Washington, D. C., on the brief), for appellant.

Vernon C. Stoneman, of Washington, D. C. (Gerard D. Reilly, Irving J. Levy, Robert S. Erdahl, and David Persinger, all of Washington, D. C., on the brief), for appellee.

Before MAHONEY, WOODBURY, and SWEENEY, Circuit Judges.

WOODBURY, Circuit Judge:

This appeal is from an order of the District Court requiring the appearance of the appellant before the Acting Regional Director of the Wage and Hour Division of the United States Department of Labor, or some other authorized representative of the Administrator of that Division, according to the terms of a certain *subpoena duces tecum*.

Jurisdiction to determine this appeal is conferred upon this court by § *128 of the Judicial Code, 28 U. S. C. A.* § 225; jurisdiction to issue the order complained of is conferred upon the court below by § *9 of the Fair Labor Standards Act of 1938. 52 Stat. 1060, 29 U. S. C. A.* § *201 et seq.*

The appellant-respondent is, and for several years has been, engaged in Lowell, Massachusetts, in the business of printing and publishing a newspaper called the Lowell Sun. On October 5, 1940, the Acting Regional Director of the Wage and Hour Division issued and signed a *subpoena duces tecum* directed to the respondent requiring it to appear on October 9, 1940, at a specified time and place in Lowell and there to produce certain of its books and papers. The respondent failed to comply with it in any way.

On October 18, 1940, the Administrator of the Wage and Hour Division, acting through its attorneys, applied to the District Court under the provisions of § 9 of the Act for an order requiring the respondent to appear and show cause why it should not appear and produce its books and records in accordance with the subpoena. Such an order was forthwith issued and served and on October 28 the respondent answered and moved to vacate the show cause order and dismiss the proceeding. On November 29, the

District Court denied the respondent's motion, granted the plaintiff's application, and ordered the respondent to appear and produce its books and records in accordance with the subpoena which, however, he modified in two respects. This is the order from which the respondent appeals.

The only contentions of the respondent which require consideration are (1) that the court below lacked jurisdiction, and (2) that the subpoena shows upon its face that it is a nullity.

[1] The respondent's jurisdictional argument is not that the *Fair Labor Standards Act of 1938* fails to authorize applications to the District Court of the kind here under consideration, but that such applications, to conform to the Act, may not be made by the Administrator but must be made by the Attorney General. *Section 4(b)* of the Act, after authorizing the Administrator to "appoint such employees as he deems necessary to carry out his functions and duties", provides: "Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General." It seems to us clear that the provisions above with respect to participation by the Attorney General in litigation in which the Administrator is involved are not mandatory but permissive; that they do not require that the Attorney General must exercise his power of direction and control in every litigated case but only that he may exercise those powers in any particular case if he deems that course advisable. We see no reason to extend the argument upon this point further, and pass on to the question of the validity of the subpoena.

[2] This subpoena was issued and signed by the Acting Regional Director pursuant to authority conferred upon him by the Administrator in Administrative Order num-

ber 48 which is reproduced in the margin.[1] The question raised is whether or not under the Act the Administrator may delegate his power to issue *subpoenas duces tecum* to his representatives.

Section 9 of the Fair Labor Standards Act of 1938 reads: "For the purpose of any hearing or investigation provided for in this Act [chapter], the provisions of sections 9 and 10 [49 and 50 of Title 15] (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, §§ 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator * * *." The pertinent part of section 9 of the Federal Trade Commission Act referred to above, after providing that the Commission or its agents shall have access to "any documentary evidence of any corporation being investigated or

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[1] "For Release Saturday, April 27, 1940. R-746.
United States Department of Labor,
Wage and Hour Division,
Washington, D. C.
Administrative Order No. 48.
Delegating Authority to all Regional Directors, Acting Regional Directors and Territorial Representatives to Issue Orders of Investigation and Subpoenas.
Pursuant to the authority vested in me by the Fair Labor Standards Act of 1938, all Regional Directors, Acting Regional Directors and Territorial Representatives of the Wage and Hour Division, United States Department of Labor, are hereby authorized to execute and issue orders for investigation; to designate and authorize representatives to make such investigations; to execute and issue subpoenas for the attendance of witnesses and the production of books, papers and documents; and to delegate to representatives who are authorized to make investigations, the authority to execute and issue such subpoenas in connection therewith.
This order delegates the powers given to the Administrator to compel by subpoena or otherwise the attendance of witnesses and the production of books, papers and documents under Sections 9 and 11 (a) of the said Act.
Signed at Washington, D. C., this 26th day of April, 1940.
(S.) Philip B. Fleming,
Philip B. Fleming,
Administrator Wage and Hour Division U. S. Department of Labor.
Published in Federal Register, April 27, 1940."

proceeded against", reads: "the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence."

Reading "Administrator" for "Commission", it seems clear that by the above provision Congress gave to the Administrator, and to him only, authority to issue and sign *subpoenas duces tecum*. This the Administrator practically concedes in his brief. But he contends that § 4(c) of the Fair Labor Standards Act authorizes him to delegate his power to issue subpoenas to representatives. This section reads: "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." The question is whether these words mean, as the Administrator contends, that he may delegate the powers conferred upon him by the Act to any representative, or whether they mean, as the respondent contends, that, although the Administrator must maintain his principal office in the District of Columbia, he may exercise his powers, and his representatives may exercise theirs, in any other place.

To adopt the Administrator's view would be to hold that the statute confers blanket powers of delegation upon him,—that under it he may delegate any of his functions to any representative. It would mean that he could delegate as he saw fit his duty to report periodically to Congress, (§ 4(d), to appoint industry committees and the chairmen thereof, to fix their compensation and prescribe their procedure, (§ 5), to approve or disapprove their reports by orders the findings of fact in which, if supported

by substantial evidence, are conclusive and which cannot be stayed pending appeal without filing a bond, (§ 10), to define certain terms used in the Act, (§ 13), to provide by regulations or orders for the employment of learners and handicapped workers (§ 14), as well as many others. It seems most unlikely that Congress, when it enacted § 4(c), intended to confer such broad powers of delegation upon the Administrator. He, however, recognizing the improbability that Congress intended any such result, asserts that § 4(c) should be construed as empowering him to delegate not all but only some of his functions. To adopt this construction of the section would, in the first place, require that the words "any or all" as used therein with reference to the Administrator's powers, be given the meaning of "some", and, in the second place, if the Administrator may delegate only certain of his functions and duties, which may he delegate and which may he not? The Act itself does not answer this question and neither the Administrator nor the courts may do so without trespassing upon the legislative function. In our view § 4(c) must be construed either as granting full powers of delegation or as granting none.

From the wording of the section as a whole and its position in the statute; from the improbability that Congress intended to clothe the Administrator with authority to delegate "any or all" of his functions, and from the fact that to construe section 4(c) as a grant of authority to delegate would reduce to mere surplusage the provisions of section 11(a), which gives the Administrator express authority to delegate his investigatory function, we are of the opinion that Congress, when it enacted section 4(c), intended to provide not for the extent of the powers of the Administrator and his representatives, but only to provide for the place where the powers given elsewhere in the Act might be exercised.

The Administrator argues that Congress must have intended to permit him to delegate his power to issue subpoenas because to limit the exercise of that power to himself alone would hamstring him in administering the Act. This argument loses force when the instances in which Congress has seen fit to limit the power to issue subpoenas to the head or heads of other administrative agencies [2] are considered. If these agencies, all of which are clothed with investigatory powers, can function under a limited power to issue *subpoenas duces tecum* we see no reason why the Administrator of the Wage and Hour Division cannot do likewise.

To be sure there are many other instances in which Congress has seen fit to make express provision for the delegation of the subpoena power by the heads of administrative agencies.[3] But these instances do not show that Congress intended to provide for such delegation here. On the contrary they indicate that Congress intended that the power should be delegable only when it explicitly so provided, and conversely, that it should not be delegable when it did not so provide.

[3] We find no merit in the Administrator's further argument to the effect that "the subpoena power simply implements the power of inspection", and, since the latter is delegable (§ 11(a), the former must be delegable also. The reason for this is that the powers are not alike. The right to enter and inspect an employer's records and make transcriptions therefrom imposes a less onerous burden than the right to compel an employer to make selection from

[2] Federal Trade Commission, 15 U. S. C. A. § 49; Civil Service Commission, 18 U. S. C. A. § 61-l (d); Board of Tax Appeals, 26 U. S. C. A. Int. Rev. Code, § 1114, § 1119, (b); National Labor Relations Board, 29 U. S. C. A. § 161 (1).

[3] Securities and Exchange Commission, 15 U. S. C. A. §§ 77uuu (a), 79r (c); Federal Power Commission, 15 U. S. C. A. § 717m (c), 16 U. S. C. A. § 825f (b); Tariff Commission, 19 U. S. C. A. § 1333; United States Maritime Commission, 46 U. S. C. A. § 1124; Federal Communications Commission, 47 U. S. C. A. 409 (a).

his own records and produce such of them as are demanded at a hearing, and so Congress may well have intended to surround the exercise of the power to impose the heavier burden with greater safeguards than it thought necessary in the case of the lighter one.

The order of the District Court is vacated and the case remanded to that court with direction to dismiss the petition in conformity with this opinion.